STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2005
v	No. 249895 Wayne Circuit Court
CARL JAMES TRAMMELL, Defendant-Appellant.	LC No. 03-003696-01

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of resisting or obstructing a police officer, MCL 750.81d, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to one year in prison for the resisting or obstructing a police officer conviction and two years in prison for the felon in possession and felony-firearm convictions. We remand.

Defendant was a passenger in a vehicle that was stopped by the police. A handgun was found under the driver's seat, and ammunition of the same caliber was found in defendant's coat pocket. At the police station, defendant refused to get out of the police car, threatened to attack the police, and attempted to "head butt" one of the officers.

Defendant's theory is that he was denied his constitutional rights to due process and a fair trial when only eleven jurors deliberated and rendered the verdict. Curiously, this issue was not raised by anyone at trial. We therefore review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The jury found defendant guilty of resisting or obstructing a police officer, felon in possession of a firearm, and felony-firearm. Fourteen jurors were selected for the trial, and two were removed before deliberations began. The trial transcript reveals that, during the polling of the jury, only eleven jurors were asked if they concurred in the verdict. The transcript does not contain any explanation or discussion of the fact that only eleven jurors were polled. Juror No. 7, who was unaccounted for, was not one of the randomly removed jurors, and there is no indication that he was dismissed from the jury. There is no indication anywhere in the transcript that more than two jurors were removed before deliberations began.

The federal Constitution does not require a jury of twelve members in a state criminal trial, *Burch v Louisiana*, 441 US 130, 134-135; 99 S Ct 1623; 60 L Ed 2d 96 (1979). The Michigan Constitution, however, provides in pertinent part:

> In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year . . . . [Const 1963, art 1, § 20.]

In Michigan, the right of trial by jury for a felony charge means the right as it existed at common law, which was a trial by a jury of twelve, and there is no legislative or constitutional authorization for conviction by a jury of less than twelve. *People v Miller,* 121 Mich App 691, 698; 329 NW2d 460 (1982).

In *People v Sizemore,* 69 Mich App 672, 674, 679; 245 NW2d 159 (1976), the defendant, convicted of a felony, argued that he was denied his right to a fair trial when thirteen jurors rendered a verdict. Because the record was confusing with regard to whether twelve or thirteen jurors had actually rendered the verdict, this Court remanded the case for a determination of the number of jurors that rendered the verdict. *Id.* at 679. Because we are similarly unable to determine whether eleven or twelve jurors rendered the verdict against defendant, we remand to the trial court for an evidentiary hearing to make such a determination.

Assuming that twelve jurors participated in deliberations and rendering of the verdict, defendant argues that he was denied his rights of due process and fair trial because Juror No. 7 did not understand English well. To properly preserve a challenge to the jury array, a defendant must raise this issue before the jury is impaneled and sworn. *People v McKinney,* 258 Mich App 157, 161; 670 NW2d 254 (2003). Because defense counsel failed to challenge Juror No. 7 at trial, this issue is unpreserved and will be reviewed for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

To qualify as a juror, a person must be "able to communicate in the English language." 600.1307a(1)(b). MCR 2.511(D) provides grounds for challenges to prospective jurors for cause. After the jury was impaneled, Juror No. 7 explained to the trial court that English was his second language and that he did not understand it very well. The prosecution and the defense stipulated to having him designated as an alternate juror, but this did not happen. Two other jurors were chosen at random as alternates and excused. After the first day of trial, the trial court asked Juror No. 7 if he could "understand mostly everything," he replied yes. We therefore conclude that the trial court did not commit error in failing to sua sponte excuse Juror No. 7.

Defendant also claims that his trial counsel was ineffective for failing to challenge Juror No. 7 for cause. Because defendant failed to properly address the merits of this claim, we conclude that it is abandoned. *People v Harris,* 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant challenges the sufficiency of the evidence regarding his felon in possession and felony-firearm convictions. Challenges to the sufficiency of the evidence in criminal trials are reviewed de novo to determine whether, in a light most favorable to the prosecutor, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Randolph,* 466 Mich 532, 572; 648 NW2d 164 (2002).

A person convicted of a specified felony may not possess a firearm until the expiration of five years and the existence of certain circumstances. MCL 750.224f(2)(a). The prosecution and the defense stipulated that defendant was convicted of a specified felony, and thus, was ineligible to possess a firearm. Felony-firearm consists of two essential elements: (1) the possession of a firearm (2) during the commission of, or the attempt to commit, a felony. MCL 750.227b(1); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

The police officer who stopped the vehicle saw defendant "slumping down by dipping his shoulder towards the driver's side." A loaded handgun was found under the driver's seat, and ammunition of the same caliber was found in defendant's pocket. There was no evidence that the handgun belonged to anyone else. Absent exceptional circumstances, issues of witness credibility are for the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). We will not interfere with the role of the trier of fact in determining the weight of the evidence or the credibility of witnesses. *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003). We therefore conclude that the evidence was sufficient to support both the felon in possession and felony-firearm convictions.

Defendant also argues that the felon in possession and felony-firearm verdicts were against the great weight of the evidence. Because he failed to raise this issue in a motion for a new trial, we review it for plain error affecting substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). A new trial based on the weight of the evidence should be granted "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *Lemmon, supra* at 642.

Because there was no evidence contradicting the officers' testimony about defendant leaning toward the driver's seat, the location of the handgun, or defendant's possession of the same caliber ammunition, we conclude that the evidence does not preponderate heavily against the verdicts, and a serious miscarriage of justice will not result. *Lemmon, supra* at 642.

Defendant presents a cursory argument that there was insufficient evidence to support his resisting or obstructing a police officer conviction. Because defendant failed to properly address the merits of this claim, we conclude that it is abandoned. *Harris, supra* at 50.

Remanded. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood